FILED
DEC 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-435

In the Supreme Court of the United States

ROBERT GUS DESSELLE, AKA UNCLE, AKA TIO, AKA POPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
CHRISTOPHER R. MADSEN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the extent of a sentencing reduction under Sentencing Guidelines § 5K1.1 or 18 U.S.C. 3553(e) (Supp. IV 2004) may be based on considerations unrelated to the defendant's substantial assistance to the government.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 14

TABLE OF AUTHORITIES

Cases:

American Constr. Co. v. *Jacksonville Ry.*, 148 U.S. 372 (1893) 5
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 5
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 10
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 5
Stinson v. *United States*, 508 U.S. 36 (1993) 10
United States v. *Booker*, 543 U.S. 220 (2005) .. 4, 6, 7, 8, 13
United States v. *Calzada-Maravillas*, 443 F.3d 1301 (10th Cir. 2006) 8
United States v. *Carey*, 382 F.3d 387 (3d Cir. 2004) 11
United States v. *Crawford*, 407 F.3d 1174 (11th Cir. 2005) 8, 9
United States v. *Dorcely*, 454 F.3d 366 (D.C. Cir.), cert. denied, No. 06-547 (Nov. 27, 2006) 13

Cases—Continued: Page

United States v. *Fernandez*, 443 F.3d 19 (2d Cir.), cert. denied, 127 S. Ct. 192 (2006) 8
United States v. *Haack*, 403 F.3d 997 (8th Cir.), cert. denied, 126 S. Ct. 276 (2005) 8
United States v. *Hadash*, 408 F.3d 1080 (8th Cir. 2005) 9
United States v. *Johnson*, 427 F.3d 423 (7th Cir. 2005) ... 8
United States v. *Jones*, 417 F.3d 547 (6th Cir. 2005) 13
United States v. *Mares*, 402 F.3d 511 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005) 8
United States v. *Martin*, 455 F.3d 1227 (11th Cir. 2006) 11
United States v. *McBride*, 434 F.3d 470 (6th Cir. 2006) 8
United States v. *McVay*, 447 F.3d 1348 (11th Cir. 2006) 12
United States v. *Mohamed*, 459 F.3d 979 (9th Cir. 2006) 9
United States v. *Moreland*, 437 F.3d 425 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006) 8
United States v. *Pearce*, 191 F.3d 488 (4th Cir. 1999) ... 11
United States v. *Pepper*, 412 F.3d 995 (8th Cir. 2005) ... 10
United States v. *Peterson*, 455 F.3d 834 (8th Cir. 2006) .. 13
United States v. *Rodriguez-Alvarez*, 425 F.3d 1041 (7th Cir. 2005), petition for cert. pending, No. 05-8615 (filed Jan. 5, 2006) 8

Cases—Continued: Page

United States v. *Saldana*, 427 F.3d 298 (5th Cir. 2005), cert. denied, 126 S. Ct. 810 (2005) and 1097 (2006) 8

United States v. *Selioutsky*, 409 F.3d 114 (2d Cir. 2005) 8

United States v. *Serrata*, 425 F.3d 886 (10th Cir. 2005) ... 8

United States v. *Shannon*, 414 F.3d 921 (8th Cir. 2005) 8

United States v. *Thomas*, 930 F.2d 526 (7th Cir.), cert. denied, 502 U.S. 857 (1991) 10

United States v. *Webb*, 403 F.3d 373 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006) 8

Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 5

Constitution, statutes and regulations:

U.S. Const. Amend. VI 6

Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*: 6

18 U.S.C. 3553(a) (2000 & Supp. IV 2004) .. 7, 8, 9, 12

18 U.S.C. 3553(a)(4) (Supp. IV 2004) 8

18 U.S.C. 3553(b)(1) (Supp. IV 2004) 6

18 U.S.C. 3553(e) (Supp. IV 2004) 3, 5, 12, 13

18 U.S.C. 3742(a)(1) 13

18 U.S.C. 3742(a)(3) 13

18 U.S.C. 3742(b)(1) 13

18 U.S.C. 3742(b)(3) 13

18 U.S.C. 3742(e) (2000 & Supp. IV 2004) 6

Statutes and regulations—Continued: Page

18 U.S.C. 2 2
18 U.S.C. 1957 2
21 U.S.C. 846 2
U.S. Sentencing Guidelines:
§ 5K1.1 ..... *passim*
§ 5K1.1(a) 10
§ 5K1.1(a)(2) 11
§ 5K1.1, comment. (backg'd.) 5, 11

Miscellaneous:

2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* (1991) 10
Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 6

In the Supreme Court of the United States

No. 06-435

ROBERT GUS DESSELLE, AKA UNCLE, AKA TIO, AKA POPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 450 F.3d 179.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2006. A petition for rehearing was denied on June 28, 2006 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on September 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Louisiana, petitioner was convicted of conspiracy to distribute cocaine, in vio-

lation of 21 U.S.C. 846, and money laundering, in violation of 18 U.S.C. 1957 and 2. He was sentenced to 87 months of imprisonment, to be followed by five years of supervised release. The court of appeals vacated petitioner's sentence and remanded for resentencing.

1. Section 5K1.1 of the United States Sentencing Guidelines authorizes a district court, on motion of the government, to depart downward from the Sentencing Guidelines range on the basis of a defendant's substantial assistance to the government. Section 5K1.1 provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
> (3) the nature and extent of the defendant's assistance;
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
> (5) the timeliness of the defendant's assistance.

Sentencing Guidelines § 5K1.1.

Section 3553(e) of Title 18 of the United States Code authorizes a district court, on motion of the government, to impose a sentence below the statutory minimum on the basis of a defendant's substantial assistance to the government. Section 3553(e) provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. 3553(e) (Supp. IV 2004).

2. Petitioner worked as a funeral director at his family's funeral home in Baton Rouge, Louisiana. On the side, he sold large quantities of cocaine and marijuana, earning substantial profits that he laundered through purchases and business ventures. In 2004, petitioner pleaded guilty to conspiracy to distribute cocaine and money laundering. Based on a total offense level of 39 and a criminal history category of I, his Sentencing Guidelines range was 262 to 327 months of imprisonment. He was also subject to a statutory minimum prison term of 10 years. Pet. App. 2a.

Pursuant to Sentencing Guidelines § 5K1.1 and 18 U.S.C. 3553(e) (Supp. IV 2004), the government filed motions for a sentencing reduction based on petitioner's substantial assistance. Because petitioner's assistance had been minimal, the government recommended a 2-

level reduction in the offense level, which would have resulted in a Guidelines range of 210 to 262 months. The district court granted the government's motions, but reduced petitioner's offense level by 10 levels. The resulting Guidelines range was 87 to 108 months, and the district court imposed a sentence at the bottom of that range. In imposing the 87-month sentence, the district court relied, not only on petitioner's assistance, but also on the fact that petitioner's drug proceeds had been forfeited to the government and the fact that petitioner has medical problems. Pet. App. 2a-4a.

3. The government appealed, and the court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 1a-7a.

The court of appeals first observed that, although *United States* v. *Booker*, 543 U.S. 220 (2005), made the Sentencing Guidelines advisory, courts are still required to "calculate the guideline range," including any "upward or downward departure as allowed by the Guidelines." Pet. App. 4a. The Guidelines calculation is "reviewed de novo," the court said, and both the decision to depart and the extent of a departure are reviewed "for abuse of discretion." *Ibid.* Assuming the Guidelines range has been correctly calculated and there has been no abuse of discretion in departing from that range, the court explained, it must then be determined "'whether the sentence "is unreasonable" with regard to' the factors outlined in 18 U.S.C. § 3553(a)." *Ibid.* (quoting *Booker*, 543 U.S. at 261).

With respect to a downward departure under Section 5K1.1 of the Guidelines, the court of appeals explained that, although the factors enumerated in Section 5K1.1 "are not the only factors a court may consider in determining the extent of the * * * departure," any other

factors a court considers "must be related to determining the 'nature, extent, and significance of assistance.'" Pet. App. 5a (quoting Sentencing Guidelines § 5K1.1, comment. (backg'd.)). The court held that "the extent of a § 5K1.1 or § 3553(e) departure must be based solely on assistance-related concerns" and that the district court "abused its discretion" in this case "by considering non-assistance-related factors in determining the extent of the § 5K1.1 departure." *Id.* at 5a-6a. The court of appeals also concluded that, even if the district court had not relied on such factors, "the extraordinary departure [would] not [be] supported by the nature of [petitioner's] assistance." *Id.* at 7a.

ARGUMENT

Petitioner contends (Pet. 7-11) that a sentencing reduction under Sentencing Guidelines § 5K1.1 or 18 U.S.C. 3553(e) (Supp. IV 2004) may be based on considerations unrelated to the defendant's substantial assistance to the government. The court of appeals' contrary decision is interlocutory; it is correct; and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals vacated petitioner's sentence and remanded the case to the district court for resentencing. The decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *American Constr. Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946

(1993) (opinion of Scalia, J.). This Court ordinarily denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition to the Court. See *ibid.* While not an invariable rule, the practice makes particular sense in this case, where petitioner challenges a sentencing rule adopted by the court of appeals and his sentence is not yet final.

2. The court of appeals' decision is in any event correct.

a. In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. As a remedy for that constitutional infirmity, the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* See *Booker*, 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Booker*, 543 U.S. at 245-246 (citations omitted). The Court also severed the appellate-review standards in 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which had served to reinforce the mandatory character of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," un-

der which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] §3553(a)." 543 U.S. at 261.[1]

---

[1] Section 3553(a) provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code * * * [;]
>
> * * * * *
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code * * * [;]
>
> * * * * *

b. *Booker* made clear that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." 543 U.S. at 264; see 18 U.S.C. 3553(a)(4) (Supp. IV 2004). Consistent with that statement, the courts of appeals have held that, before imposing sentence, district courts are obligated to calculate the advisory Guidelines range and to do so correctly.[2] Most courts of appeals treat Guidelines departures as part of the Guidelines calculation.[3] And when district courts miscalculate the

---

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. 3553(a) (2000 & Supp. IV 2004).

[2] See, *e.g.*, *United States* v. *Rodriguez-Alvarez*, 425 F.3d 1041, 1046 (7th Cir. 2005), petition for cert. pending, No. 05-8615 (filed Jan. 5, 2006); *United States* v. *Serrata*, 425 F.3d 886, 912 (10th Cir. 2005); *United States* v. *Shannon*, 414 F.3d 921, 923 (8th Cir. 2005); *United States* v. *Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *United States* v. *Crawford*, 407 F.3d 1174, 1178-1179 (11th Cir. 2005); *United States* v. *Webb*, 403 F.3d 373, 383-384 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006); *United States* v. *Mares*, 402 F.3d 511, 518-519 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005).

[3] See, e.g., *United States* v. *Calzada-Maravillas*, 443 F.3d 1301, 1305 (10th Cir. 2006); *United States* v. *Fernandez*, 443 F.3d 19, 25 (2d Cir.), cert. denied, 127 S. Ct. 192 (2006); *United States* v. *Moreland*, 437 F.3d 424, 432-433 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006); *United States* v. *McBride*, 434 F.3d 470, 476 (6th Cir. 2006); *United States* v. *Saldana*, 427 F.3d 298, 308-313 (5th Cir. 2005), cert. denied, 126 S. Ct. 810 (2005) and 1097 (2006); *Crawford*, 407 F.3d at 1178-1182; *United States* v. *Haack*, 403 F.3d 997, 1003 (8th Cir.), cert. denied, 126 S. Ct. 276 (2005). The Seventh Circuit has taken the position that "after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions." *United States* v. *Johnson*, 427 F.3d 423, 426 (7th Cir. 2005).

Guidelines range, courts of appeals will remand the case for resentencing (unless the error is harmless) without addressing the question whether the sentence was unreasonable based on the factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). See, *e.g.*, *United States* v. *Hadash*, 408 F.3d 1080, 1082 (8th Cir. 2005); *United States* v. *Crawford*, 407 F.3d 1174, 1179-1182 (11th Cir. 2005).

The court of appeals applied those settled principles here. It recognized that a district court must correctly "calculate the guideline range," including any "upward or downward departure." Pet. App. 4a. It then held that the district court miscalculated the Guidelines range in this case, because the district court "abused its discretion * * * in determining the extent of the § 5K1.1 departure." *Id.* at 6a. The court of appeals therefore remanded for resentencing. *Id.* at 1a, 7a.

c. The court of appeals' conclusion that the district court abused its discretion in determining the extent of the Guidelines departure was correct. The district court "consider[ed] non-assistance-related factors in determining the extent of the § 5K1.1 departure," Pet. App. 6a, including the fact that petitioner's drug proceeds had been forfeited to the government and the fact that petitioner had medical problems, *id.* at 2a-4a. The court of appeals held that the district court had thereby abused its discretion because "the extent of a § 5K1.1 * * * departure must be based solely on assistance-related concerns." *Id.* at 5a. That holding is correct.

Accordingly, "instead of employing the pre-*Booker* terminology of departures," the Seventh Circuit has "moved toward characterizing sentences as either fitting within the advisory guidelines range or not." *Ibid.* The Ninth Circuit has adopted a similar approach. See *United States* v. *Mohamed*, 459 F.3d 979, 984-987 (9th Cir. 2006).

The first sentence of Section 5K1.1 grants district courts the authority to depart from the Guidelines range if the government makes a motion stating that the defendant has provided substantial assistance. The second sentence addresses the extent of any such departure. It provides that "[t]he appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following." Sentencing Guidelines § 5K1.1(a). It then lists five considerations related to substantial assistance: (1) the "significance and usefulness" of the assistance; (2) the "truthfulness, completeness, and reliability" of the information or testimony provided; (3) the "nature and extent" of the assistance; (4) any "injury" or "risk of injury" resulting from the assistance; and (5) the "timeliness" of the assistance. *Ibid.* Under the interpretive canon *ejusdem generis*, "general words" accompanying "specific words" in a "statutory enumeration" should be "construed to embrace only objects similar in nature to those * * * enumerated by the * * * specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). In the second sentence of Section 5K1.1, the general word "reasons" should be construed to embrace only objects similar in nature to those enumerated by the five specific considerations—namely, objects related to substantial assistance. See *United States* v. *Thomas*, 930 F.2d 526, 529 (7th Cir.), cert. denied, 502 U.S. 857 (1991); cf. *United States* v. *Pepper*, 412 F.3d 995, 998 (8th Cir. 2005) (applying related interpretive canon *noscitur a sociis*).

That construction is confirmed by the commentary to Section 5K1.1. See *Stinson* v. *United States*, 508 U.S. 36

(1993) (commentary that interprets or explains a guideline is ordinarily authoritative). The commentary states that, because "[t]he nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis[,] [l]atitude is * * * afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above." Sentencing Guidelines § 5K1.1, comment. (backg'd.). The quoted language strongly suggests that unenumerated factors are "relevant" grounds for departure only insofar as they bear upon the "nature, extent, and significance of assistance." See, *e.g.*, *United States* v. *Martin*, 455 F.3d 1227, 1235 (11th Cir. 2006); *United States* v. *Pearce*, 191 F.3d 488, 492 (4th Cir. 1999).

3. Petitioner does not contend that the decision below conflicts with the decision of any other court of appeals. On the contrary, he acknowledges that "several other federal appellate courts have * * * adopted th[e] [same] position" as the court below, Pet. 7 (footnote omitted), and he cites decisions from eight other circuits holding that the extent of a departure under Sentencing Guidelines § 5K1.1 may not be based on considerations unrelated to substantial assistance, *id.* at 7 n.2.[4]

Petitioner does contend (Pet. 7-10) that the decision below conflicts with this Court's decision in *Booker*. In

---

[4] Petitioner also cites the Third Circuit's decision in *United States* v. *Carey*, 382 F.3d 387, 391 (2004), for the proposition that "factors not listed in 5K1.1 can be[] considered in deciding the extent of a 5K1.1 departure." Pet. 7 n.2. But the statement to that effect in *Carey* is dictum, because the district court in that case did not rely on any such factors. Instead, the district court relied on the defendant's credibility as a witness, 382 F.3d at 389-390, a consideration explicitly identified as a permissible one in Section 5K1.1(a)(2).

particular, he contends that the court of appeals' decision is "in direct contravention of *Booker*" because the court of appeals assertedly held that the government's Section 5K1.1 motion "stripped the district court of its discretionary power to consider any of the § 3553(a) factors." Pet. 9. Petitioner's contention is mistaken, because that is not what the court of appeals held.

What the court of appeals held is that the first step at sentencing is to calculate the advisory Guidelines range and that, in calculating one aspect of the Guidelines range (namely, the extent of a downward departure based on substantial assistance), a district court may not rely on considerations other than those authorized by the Guidelines provision at issue (namely, Section 5K1.1). The court of appeals' conclusion that the district court erred in relying on such considerations does not preclude the district court, on remand, from departing downward based solely on petitioner's substantial assistance and then deciding that a lower sentence—*i.e.*, a below-Guidelines sentence—is justified by the considerations in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Indeed, "after it has decided the length of departure warranted by the substantial assistance motion, the district court is * * * *obliged* to take into account [both] the [resulting] advisory Guidelines range *and* the sentencing factors set forth in 18 U.S.C. § 3553(a) in fashioning a reasonable sentence." *United States* v. *McVay*, 447 F.3d 1348, 1356 (11th Cir. 2006) (emphasis added).

There are only two limitations on the district court's ability to impose such a below-Guidelines sentence. First, if a sentence below the 10-year statutory minimum is imposed, it cannot be based on any consideration unrelated to substantial assistance. See 18 U.S.C. 3553(e) (Supp. IV 2004) (authorizing sentence below

statutory minimum "so as to reflect a defendant's substantial assistance").[5] Second, whatever sentence is ultimately imposed, it cannot be "'unreasonable' with regard to § 3553(a)." *Booker*, 543 U.S. at 261.[6]

---

[5] Like the Fifth Circuit in this case, Pet. App. 5a, the Eighth Circuit has held, post-*Booker*, that the extent of a reduction under 18 U.S.C. 3553(e) (Supp. IV 2004) can be based only on assistance-related considerations, *United States* v. *Peterson*, 455 F.3d 834, 837 (2006). Petitioner cites no decision that holds otherwise.

[6] Petitioner also challenges (Pet. 10-11) the court of appeals' alternative holding that, even if the district court's downward departure were based solely on assistance-related considerations, "the extraordinary departure [would] not [be] supported by the nature of [petitioner's] assistance." Pet. App. 7a. Citing pre-*Booker* Fifth Circuit decisions, petitioner contends that that holding is incorrect because district courts have "almost complete discretion to determine the extent of downward departures under § 5K1.1." Pet. 10. The cases on which petitioner relies, however, are ones in which a defendant appealed a substantial-assistance departure on the ground that the district court should have departed further. See *ibid*. The reason that the departures in those case were found to be essentially unreviewable is that, under 18 U.S.C. 3742(a)(3), a defendant could appeal a sentence only if it was "greater than the sentence specified in the applicable guideline range." See *United States* v. *Jones*, 417 F.3d 547, 551 (6th Cir. 2005) ("Where * * * the district court grants a downward departure for substantial assistance and the defendant's claim on appeal goes only to the extent of the departure, this Court has no jurisdiction over the appeal.") (citing 18 U.S.C. 3742(a)(3)). Under 18 U.S.C. 3742(b)(3), in contrast, the government could appeal a sentence that was "less than the sentence specified in the applicable guideline range." After *Booker*, moreover, *either* party can appeal a sentence, whether within or outside the Guidelines range, on the ground that it is unreasonable and therefore "in violation of law." 18 U.S.C. 3742(a)(1) and (b)(1); see *United States* v. *Dorcely*, 454 F.3d 366, 373-375 (D.C. Cir. 2006) (citing cases), cert. denied, No. 06-547 (Nov. 27, 2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

CHRISTOPHER R. MADSEN
Attorney

DECEMBER 2006